

**MINUTES OF
ADVISORY COMMITTEE ON RULES OF EVIDENCE**

Friday, September 28, 2012

Arizona Courts Building

1501 W. Washington, Conference Room 230

Web Site: <http://www.azcourts.gov/rules/AdvisoryCommitteeonRulesofEvidence.aspx>

Members Present:

The Honorable Samuel Thumma, Co- Chair
The Honorable Mark Armstrong (Ret.), Co-
Chair
Mr. Paul Ahler
The Honorable George Anagnost
The Honorable Dave Cole (Ret.)
Mr. Timothy Eckstein
The Honorable Pamela Gates
Mr. William Klain
Ms. Shirley McAuliffe
The Honorable Michael Miller
Mr. Carl Piccarreta
Ms. Patricia Refo (via telephone)
The Honorable James Soto

Members Not Present:

Mr. Milton Hathaway
The Honorable Paul Julien

Quorum:

Yes

1. Call to Order, Welcome and Introductions—Judge Thumma

Judge Thumma called the meeting to order at 10:00 a.m., welcomed members, and thanked them for their participation on the committee. Members introduced themselves. In addition, Chief Justice Berch thanked the Advisory Committee for their work on critical issues of great importance to the bar and to the State of Arizona.

2. Goals and Mission—Judges Thumma and Armstrong

Judge Thumma stated that the Advisory Committee on Rules of Evidence would build upon the past work of the Ad Hoc Committee on Rules of Evidence, and that the work of the Advisory Committee focus on the following:

- Maintain and monitor the Rules of Evidence
- Review rule change proposals
- Compare the Arizona Rules of Evidence to the Federal Rules of Evidence
- Entertain comments about the Rules
- Write reports for the Arizona Supreme Court, as necessary.

Judge Armstrong discussed the broad mandate given to the Advisory Committee in the Administrative Order creating the committee but stated that Justice Hurwitz, who was the founder of the Ad Hoc and Advisory Committees, had a narrower vision, which primarily encompassed tracking changes to the Federal Rules of Evidence and considering their adoption. Justice Hurwitz did not countenance a creative committee. Ms. Refo commented similarly that changes should be made to the rules only for good reason.

Judge Armstrong also stated that the Advisory Committee was modeled after the federal Advisory Committee on Evidence Rules, which monitors the need for changes in the Federal Rules. Current issues the federal committee is reviewing include the following:

1. *Crawford v. Washington* and progeny addressing the Confrontation Clause
2. Privileges and guidance around that issue (both statutory and at common law)
3. A continuous study of the Federal Rules of Evidence, using specific criteria for making changes: a split in authority; disparities between the text and the way a rule is applied; and difficulties in applying the rule among the courts, attorneys, and academics.

Judge Thumma noted that the Advisory Committee is one of equals, and that he was pleased to witness the free exchange of ideas at the Ad Hoc Committee meetings. He noted that the composition of the Advisory Committee was designed to create such dialogue.

3. Succession Planning and Tentative Meeting Schedule—Judge Thumma

Judge Thumma stated that the issue of succession was raised after Chief Justice Berch first appointed members of the Advisory Committee in Administrative Order 2012-43. Thus, Administrative Order 2012-74, which adds Judges Gates and Anagnost to the committee, also

sets forth the expectation that committee members would serve no longer than six years, in staggered two- and three-year terms, recognizing that each member of the committee serves at the pleasure of the Chief Justice.

Judge Thumma stated that 2013 Advisory Committee meetings are tentatively scheduled for January 18, April 19, July 19, and October 18, 2013. All meetings times are set from 10:00 a.m. to noon in Room 230 of the Arizona Courts Building. If members are unable to attend in person, they may appear telephonically. If there are no agenda items for a planned meeting, that meeting may be cancelled.

Upon being advised that CLE by the Sea is scheduled for July 19, Judge Armstrong agreed to look into an alternative date.

4. Committee and Federal Rules of Evidence Websites—Judge Armstrong

Judge Armstrong discussed the links to several websites of importance to the committee (links provided via hard copy). The **Arizona Judicial Branch** website (<http://www.azcourts.gov/>) has links to minutes, agendas, administrative orders, and subcommittee reports from the Ad Hoc Committee on Rules of Evidence, as well as administrative orders and agenda for the Advisory Committee on Rules of Evidence. In the future, the Advisory Committee's website will also include additional agendas, minutes, subcommittee reports, and any petitions that the committee files.

[Directions: click on the AZ Courts tab, then click on Committees & Commissions. Scroll down for committee names.]

The AZ Supreme Court tab includes both Court Rules and the Rules Forum, which makes all petitions, comments, and any actions taken on petitions available for browsing. Advisory Committee members are encouraged to register for access to the Rules Forum due to participation on this committee (some committee members are already registered, but all are eligible to register). Judge Armstrong also stated that if committee members register they may sign up to receive email updates whenever materials are uploaded in regard to the Arizona Rules of Evidence, including petitions and comments. There is currently a proposed rule change petition filed by Jack Levine in R-12-0029. At the January Advisory Committee meeting, Mr. Levine will speak to the committee and the committee will consider whether to file a comment concerning that petition.

Judge Armstrong next discussed the Rules and Policies tab of the **United States Courts** (<http://www.uscourts.gov/RulesAndPolicies.aspx>) website. This is the main site for information regarding the Federal Rules of Practice & Procedure, and the primary resource for committee members regarding proposed amendments of the Federal Rules of Evidence. However, the version on this website does not include the Notes to the rules, but the **Cornell** website does (<http://www.law.cornell.edu/rules/fre/?q=rules/fre>).

Under the Rules & Policies tab of the **United States Courts** website, look for the Federal Rules of Practice & Procedure link. At that site, one may find current rules of practice and procedure,

pending rules amendments, proposed amendments published for public comment, and the records and archives of the rules committees. Under Records and Archives of the Rules Committees, one may find advisory committee reports, meeting minutes and an item labeled Agenda Books, which holds a wealth of information, including an exhaustive study of *Crawford v. Washington* and its progeny by Professor Dan Capra, as well as the latest comments on proposed rule changes.

Ms. Refo stated that the Agenda Books contain an extraordinarily complete archive of information regarding proposed rules changes, and noted the bias of the federal advisory committee against amending a rule unless there is a good reason to do so.

[Directions: click on the Rules & Policies tab, then click on Federal Rules of Practice & Procedure, then Records and Archives of the Rules Committees, then click on Agenda Books.]

Judge Armstrong also noted the Federal Evidence Review website (<http://federalevidence.com/>), which is an excellent resource with free information, although it is also a subscription service.

Action item: please sign up for the Rules Forum on the Arizona Courts website and sign up for rules updates on the United States Courts website.

5. Sua Sponte Petition in R-11-0039 and Ariz. R. Evid. 608—Judge Armstrong

Judge Armstrong stated that these items would be covered together because they are related. Judge Armstrong summarized the sua sponte petition in R-11-0039 that he filed last December to clarify certain rules and amend Rule 608. The proposed changes to Rule 608 came out of last year's Rules Agenda. The reasons for the proposed changes are set forth in the petition. The State Bar of Arizona filed a comment in support of the petition, except for the proposed changes to Rule 608. The State Bar opposed the proposed changes to Rule 608 because the changes "would expressly permit a party to bolster a witness's credibility before that credibility had been called into question by attack on cross-examination."

At its 2012 Rules Agenda, the Supreme Court approved the proposed rule changes save the proposed changes to Rule 608. The Court continued its consideration of the petition to the extent it proposed to amend Rule 608 pending the committee's review and recommendation. Judge Thumma noted that proposed Rule 608 differs from Federal Rule of Evidence 608, and Judge Armstrong noted that Justice Hurwitz has informally recommended against making the changes in order to remain consistent with the Federal Rules.

Discussion was had, a vote was taken, and the committee unanimously voted to recommend rejecting the proposed changes to Rule 608 for the reasons posited by the State Bar and in order to remain consistent with the Federal Rules. Judge Armstrong will report this recommendation to the Court at its December 2012 Rules Agenda.

6. Consider Proposed Amendment to Correspond ARE to Fed. R. Evid. 803(10)—Judge Armstrong

Judge Armstrong explained that the federal Advisory Committee on Evidence Rules has proposed the following amendment of Rule 803(10):

Rule 803. Exceptions to the Rule Against Hearsay —Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(10) *Absence of a Public Record.* Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that:~~

(A) the testimony or certification is admitted to prove that

~~(A i)~~ the record or statement does not exist; or

~~(B ii)~~ a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a “notice-and-demand” procedure that was approved by the *Melendez-Diaz* Court. *See* Tex. Code Crim. P. Ann., art. 38.41.

According to the federal Advisory Committee on Evidence Rules, “[t]he proposed amendment aligns Rule 803(10) with the Supreme Court’s ruling in *Melendez-Diaz v. Massachusetts*, 129 S.

Ct. 2527 (2009). *Melendez-Diaz* held that certificates reporting the results of forensic tests conducted by analysts are “testimonial” within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington*, 541 U.S. 36 (2004), making the admission of such certificates in lieu of in-court testimony a violation of the accused’s right of confrontation. The amendment adopts a “notice-and-demand” procedure that would require production of the person who prepared the certificate stating the absence of a public record only if the defendant, after receiving notice from the government, made a timely pretrial demand for production of the witness.” *Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure*, A SUMMARY FOR BENCH AND BAR (August 2011).

Public comment on this proposed amendment has expired. The federal Advisory Committee on Evidence Rules has reviewed the two comments received and decided not to make changes to its original proposal. On June 11, 2012, the federal Committee on Rules of Practice and Procedure recommended that the Judicial Conference approve the proposed amendment. The Judicial Conference is expected to take up the amendment in September 2012, but no formal results have been released. If the amendment is approved by the Judicial Conference, it will then be considered by the Supreme Court and finally Congress. If this proposal proceeds in due course, it is expected that the change to the federal rule would become effective December 1, 2013.

Judge Thumma suggested that the petition could be conditioned upon the federal rule change becoming final, and Mr. Ahler stated that there was an issue of alignment of Arizona-specific rules, specifically Ariz. R. Crim. P. 16.1(b). Mr. Eckstein also noted concerns under Ariz. R. Crim. P. 15.1. Judge Armstrong noted that a change aligning Rule 803(10) to *Melendez-Diaz* would not affect normal disclosure requirements. Judge Armstrong noted that a provision could be added stating that changes are not intended to alter any disclosure practices. Further discussion ensued regarding disclosure concerns, and the rights of defendants.

Judge Thumma obtained consensus from the committee to craft a petition proposing changes to Rule 803(10) consistent with the federal proposal, but with the following conditions/changes: (1) the proposed change to the Arizona rule would (a) note that the federal rule change is pending and (b) be conditioned upon final approval of the proposed amendment of the federal rule; (2) the proposed Arizona rule would use 10/20 day time periods consistent with Ariz. R. Crim. P. 16.1(b); (3) the proposed Arizona rule would delete the reference to the Texas statute in its comment; and (4) the following language would be added to the comment to the proposed Arizona rule: “This rule change is not intended to alter any disclosure requirements in other applicable rules of practice and procedure.” Judge Armstrong agreed to draft and circulate the petition, which is to be filed by January 10, 2013.

7. Proposed Amendments to Fed. R. Evid. 801(d)(1)(B) and 803 (6)-(8)—Judge Armstrong

Judge Armstrong directed the discussion to the proposed changes to Fed. R. Evid. 801(d)(1)(B) and 803 (6)-(8). The first is an amendment to Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness’s credibility. The other three proposals amend Rules 803(6)-(8)—the hearsay exceptions for records, absence of business records, and public records—to eliminate an ambiguity

uncovered during the federal restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy. The federal proposal is out for public comment until February 15, 2013. No formal comments have been made to date but at least one informal comment has been recorded with respect to the proposed amendment of Rule 801(d)(1)(B). If this proposal proceeds in due course, it is expected that these changes to the federal rules would become effective December 1, 2014.

Judge Armstrong stated that it was too early to prepare a petition but that a subcommittee should be created to review the proposed changes. He queried whether the prior consistent statement issue was more of a federal than a state issue. Judge Thumma noted that the issue needed to be reviewed carefully in regard to Arizona state law. Ms. Refo suggested that the subcommittee could potentially submit comments to the federal advisory committee, if appropriate.

Judge Armstrong concluded that if the committee eventually chooses to file a petition, it should do so by January 10, 2014. This would align the timing of the Arizona amendment to that of the federal amendment.

Action item: a subcommittee was formed, whose members include: General Cole (chair); Mr. Piccarreta; Mr. Ahler; and Mr. Eckstein. The subcommittee agreed to meet and report back at the next meeting.

8. Ariz. R. Evid. 615 and Social Media—Judge Thumma

Judge Thumma noted that Paul Julien was working on this issue, and that Chief Justice Berch had established the Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings in March 2012, with Justice Brutinel as chair. This committee will submit a report and recommendations by November 30, 2012.

Judge Thumma noted that Justice Brutinel's Committee is addressing social media in a variety of different contexts. A potential issue specifically identified was Rule 615, and the admonitions given to potential witnesses not to talk with anyone but attorneys. He stated that with the current state of technology and social media, the admonition aims too low, and that other issues were becoming apparent: for example, a post-conviction relief petition in which jurors befriended a victim's family through the use of technology. Judge Thumma noted that this committee needed to be ready to move quickly and create a proposal if necessary.

Ms. Refo noted that social media issues are being examined at the federal level and that the Judicial Conference approved a new instruction to jurors in regard to their conduct and use of social media during trial. Judge Miller and Mr. Klain expressed concerns about using Rule 615 as a vehicle with which to address this issue.

Judge Thumma requested that a subcommittee be established whose work product deadline should be coordinated with the findings of Justice Brutinel's committee.

Action item: a Rule 615 Subcommittee was formed, whose members include: Mr. Klain (chair); Judge Soto; Judge Miller; and Judge Julien. The subcommittee agreed to report back before the next meeting.

9. CBT Evidence Module—Judge Thumma

This item was deferred until the next meeting.

10. Educational Opportunities—Judge Thumma

Judge Thumma asked the committee for feedback in regard to outreach opportunities to provide education about the Rules of Evidence for various groups and stakeholders. Judge Thumma noted a training he and Judge Armstrong had conducted for the Arizona Forensic Science Academy. Judge Miller noted a training he had done for mental health professionals. Judge Gates discussed the possibility of a new video for jurors. Judge Gates agreed to further investigate. Mr. Klain discussed the possibility of providing information in the context of updating bar convention attendees.

11. Other Items for Discussion—Judge Thumma

The committee agreed to cancel the July meeting and meet in June instead, but did not agree upon a date. Judge Armstrong agreed to check out potential dates for a June 2013, meeting.

A call was then made to the public.

Following the call to the public, the meeting was adjourned at approximately 11:55 a.m.